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11 | ***Wellmark, Inc., and Aviva USA Corp.***

12

13 | UNITED STATES DISTRICT COURT

14 | NORTHERN DISTRICT OF CALIFORNIA

15

16 | **XimpleWare Corp**., California Corporation

Case No. 13-cv-05161-PSG

17 | Plaintiff,

18 | v.

DEFENDANTS PACIFIC LIFE INS. CO.;
METROPOLITAN LIFE INS. CO.; THE
PRUDENTIAL INS. CO. OF AMERICA;
WELLMARK, INC. AND AVIVA USA
CORP'S NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF
XIMPLEWARE CORP'S CLAIMS OF
PATENT INFRINGEMENT AND
DECLARATORY JUDGMENT AND
MEMORANDUM OF POINTS AND
AUTHORITIES

19

20 | **Versata Software, Inc. f/k/a Trilogy
Software, Inc.**; **Trilogy Development
21 | Group, Inc**.; **Ameriprise Financial, Inc.**,;
Ameriprise Financial Services, Inc., and
22 | **Aurea Software, Inc. a/k/a Aurea, Inc.**,;
**Pacific Life Ins. Co; United HealthCare
23 | Services, Inc.; Metropolitan Life Ins.
Co.; The Prudential Ins. Co. of America;
24 | Wellmark, Inc.; Waddell & Reed
Financial, Inc.; and Aviva USA Corp.**,

HEARING

25 | Defendants.

Date: March 18, 2014
26 | Time: 10:00 a.m.
Location: Courtroom 5 – 4th Floor
Judge: Hon. Paul S. Grewal

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MOTION TO DISMISS   CASE NO. 3:13-CV-05161 PSG

NOTICE OF MOTION

To all parties and their counsel of record:

Please take notice that on March 18, 2014, at 10:00 a.m. or as soon thereafter as the matter may be heard before the Honorable Paul. S. Grewal, in Courtroom 5 of the United States District Court of the Northern District of California, San Jose Division, located at 280 South 1ˢᵗ Street, San Jose, CA 95113, Defendants Pacific Life Ins. Co., Metropolitan Life Ins. Co., the Prudential Ins. Co. of America, Wellmark, Inc. and Aviva USA Corp. ("Defendants" or "Customers") hereby move the court to dismiss Plaintiff XimpleWare Corp.'s claims of patent infringement and declaratory relief alleged in its Complaint.

Defendants seek an Order dismissing XimpleWare's claims of patent infringement and declaratory relief with prejudice. This motion is made on the grounds that XimpleWare fails to state a claim upon which relief may be granted for patent infringement. This motion is made pursuant to Fed. R. Civ. P. 12(b)(6) and L.R. 7-2 and is based on this Notice, the following Memorandum of Points and Authorities, all other matters of which the Court takes judicial notice, the court's file in this matter, and any other evidence and argument as may be presented at the hearing on the motion.

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TABLE OF AUTHORITIES

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CASES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants Pacific Life Ins. Co., Metropolitan Life Ins. Co., the Prudential Ins. Co. of America, Wellmark, Inc. and Aviva USA Corp. ("Defendants" or "Customers") have been accused of patent infringement by Plaintiff XimpleWare Corp. ("XimpleWare") based on allegations that they purchased software from one or more of Versata Software, Inc., Trilogy Development Group, Inc. or Aurea Software, Inc., collectively referred to by XimpleWare as the "Versata Defendants". Aside from being an obvious ploy to leverage a settlement with the Versata Defendants, XimpleWare's claims are legally and factually deficient. XimpleWare offers the use of its software to the world, for free, under an open-source license. Under the terms of that license, which applies to Customers, there is no restriction on the use of the software. The license only restricts the method by which a party may modify, copy or distribute the software. Thus, XimpleWare's claim that the Customers infringed the patents through their use of software alleges only licensed activity.

In an attempt to avoid the fact that the Customers are licensed, XimpleWare amended its complaint to add conclusory allegations, that as pled, fail to save its claims. XimpleWare has not sufficiently alleged the Customers have engaged in any unlicensed activity under the terms of the GPL license.[1] The additional allegations that XimpleWare added in the amended complaint suffer from several defects. First, XimpleWare engaged in group pleading and fails to differentiate between Customers in its allegations. Second, XimpleWare makes conclusory allegations that are contradicted and improper. For example, in one of its allegations, XimpleWare alleges that all of the defendants sell infringing products. *See* Dkt. 18 at ¶ 81. But as is addressed more fully in the Versata Defendants' Motion to Dismiss filed concurrently herewith, XimpleWare does not identify any software product, other than DCM, that allegedly infringes on the asserted patents. Yet, in its own complaint, XimpleWare accuses the Versata

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[1] The Customers note that even if XimpleWare had complied with Form 18, which it has not, such compliance does not guarantee compliance with Rule 11 of the Federal Rules of Civil Procedure. Even if the Amended Complaint had stated a plausible claim for patent infringement on its face, that would not have immunized XimpleWare as it has failed to identify easily ascertainable evidence of noninfringement through appropriate pre-suit investigation. *K-Tech Telecomms., Inv. v. Time Warner Cable, Inc.,* 714 F.3d 1277, 1285 (Fed. Cir. 2013).

1   Defendants of creating and distributing DCM to the Customers. In an attempt to manufacture an

2   allegation of distribution, XimpleWare alleges that the Customers themselves distribute DCM –

3   but this allegation is simply not pled with the sufficient factual particularity necessary to survive a

4   motion to dismiss.   XimpleWare's vague reference to "other products" that infringe is also not

5   sufficiently specific.

6   Finally, with respect to willful infringement, XimpleWare fails to allege any of the

7   requisite facts necessary for a willfulness allegation. In fact, the sole allegation raised in the

8   amended complaint is as follows:

9
> The Customer Defendants infringed and continue to willfully infringe the Patents
10   > by using the infringing Versata Products, incorporated into the Customer
> Defendants' internal software systems which the Customer Defendants used and
11   > continue to use in their daily course of business. Dkt. 18 at ¶ 84.

12   That allegation is insufficient to survive a motion to dismiss under the relevant pleading

13   standards.

14

15   **FACTUAL BACKGROUND**

16   XimpleWare is a software company that distributes free software under the GNU General

17   Public License ("GPL"). Dkt. 18 ¶¶ 23; 26. XimpleWare's software performs the function of

18   parsing XML documents. Dkt. 18 ¶¶ 16-21.   Importantly, the GPL places no restrictions on the

19   use of the software. Dkt. 18-1 (GPL) at 1. Instead, the GPL restricts a licensee's rights to modify

20   or distribute the software.   Dkt. 18-1 at 2. In the GPL's own words: "activities other than

21   copying, distribution and modification are not covered by this License…[t]he act of running the

22   program is not restricted." Dkt. 18-1 at 3. The GPL also provides that a party that receives a

23   copy of the software automatically receives a license under the GPL as well. Dkt. 18-1 at 4. The

24   GPL further makes clear that if a transferor of the software breaches the terms of the GPL, that

25   breach does not affect the license of the transferee. Dkt. 18-1 at 3. In short, any use the

26   Customers may make of XimpleWare is licensed, and the claims against the Customers must be

27   dismissed.

28   The Customers are not software companies, which XimpleWare itself acknowledges.

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XimpleWare classifies United HealthCare Services, Inc. as a "diversified managed health care company", Metropolitan Life Insurance Company as a" a global provider of insurance, annuities, and employment benefit programs", The Prudential Insurance Company of America as providing "insurance and financial services", Wellmark, Inc. as "an insurance company" and Aviva USA Corporation as "a multinational insurance company." Dkt. 18 at ¶ 10, 11, 12, 13, and 14. For this reason alone XimpleWare's allegation that the Customers make DCM, or make other software products that infringe is not only legally insufficient, it is factually highly implausible.

ARGUMENT

In order to survive a motion to dismiss, a claim must be supported by factual allegations. *Ashcroft v. Iqbal,* 556 U.S. 662, 678-9 (2009). Those facts must be sufficient to push the claims "across the line from conceivable to plausible[.]"*Ashcroft v. Iqbal,* 556 U.S. at 680. Further, the pleadings must contain sufficient "facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A license, whether implied or express, is a defense to a claim of patent infringement. *Carborundum Co. v. Molten Metal Equip. Innovations, Inc.,* 72 F.3d 872, 878 (Fed. Cir. 1995); *Intel Corp. v. VIA Technologies, Inc.,* 174 F. Supp. 2d 1038, 1055 (N.D. Cal. 2001) *aff'd,* 319 F.3d 1357 (Fed. Cir. 2003) (granting summary judgment on license defense to patent infringement). Here, because the Customers are licensed, and because the allegations stated do not give rise to a plausible claim of patent infringement, XimpleWare's claims against the Customers must be dismissed.

A. The Customers are Licensed.

XimpleWare's own Amended Complaint establishes that <u>use</u> is licensed under the terms of the GPL unless there is a failure to comply with the conditions of the GPL. Dkt. 18 at ¶ 39. XimpleWare alleges that the Customers received the XimpleWare software from the Versata Defendants, who XimpleWare alleges received the software under the terms of the GPL. *See* Dkt. 18 at ¶¶ 9; 11-13; 15; 62-63. The GPL provides that entities who receive the software

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1   "automatically receive[] a license from the original licensor to copy, distribute or modify the

2   Program subject to" the GPL. Dkt. 1-1 at 4.   "[T]he act of running the program is not restricted"

3   by the GPL.   *Id.* at 2.   Therefore, under the terms of the GPL itself, and according to

4   XimpleWare's Amended Complaint, each of the Customers is licensed.

5   XimpleWare attempts to paint the Customers' use as outside of the license by improperly

6   alleging that it has "never granted …any other Defendant in this case any commercial license,

7   permission, or authorization to *use* and redistribute any XimpleWare Product or Source Code."

8   Dkt. 18 at ¶ 73. As an initial matter, commercial activity is not automatically outside of the

9   GPL.[2] But more importantly, XimpleWare need not itself grant a license to the Customers – a

10   distributee like the Customers receives a license from the transferor "***automatically***" under the

11   terms of the GPL. *See* Dkt. 18-1 at 4 (emphasis added). And, upon receiving the GPL license,

12   any *use* of the software is not restricted, because the GPL does not restrict use. Even taking

13   XimpleWare's allegation as true upon receipt of the software, the Customers became licensed to

14   use the software under the GPL. Further, neither receiving nor using XimpleWare is prohibited

15   by the terms of the GPL. Because the actions alleged are licensed, the infringement claim against

16   the Customers must be dismissed. *See* Dkt.18 at ¶73; ¶84 (alleging use of XimpleWare).

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19   **B. Versata's Alleged Breach of the GPL Does Not Extinguish the Customers'**
                  License to Use XimpleWare.

20   XimpleWare does not allege facts that would support allegations of impermissible

21   copying, distribution or modification by the Customers anywhere in the Amended Complaint.

22   Instead, the only attempts at factual allegations to that effect are directed to the Versata

23   Defendants and Ameriprise. Any alleged misconduct by the Versata Defendants does not limit or

24   extinguish the rights of the Customers to use XimpleWare. As the GPL makes clear, "parties

25   who have received copies or rights from you under the License will not have their licenses

26

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     _____
28   [2] "You may charge a fee for the physical act of transferring a copy, and you may at your option offer warranty
     protective in exchange for a fee." Dkt. 18, 1-1 at 1.

                                                     4

terminated so long as such parties remain in full compliance." Dkt. 18-1 at 3. In other words, the actions of the transferor do not impact the rights of the transferee. Therefore, the Customers' rights as users of XimpleWare are not impacted by another's allegedly improper modification, distribution or copying of the software. Under the facts alleged by XimpleWare, therefore, the Customers are licensed to use XimpleWare's software under the GPL.

C. XimpleWare's Allegations of Breach of the GPL are Factually Insufficient.

In response to an initial Motion to Dismiss filed by Ameriprise (Dkt. No. 15), XimpleWare has amended its complaint to assert, without factual support, that the Customers' own actions have led to termination of the GPL license through impermissible distribution or copying of the software.[3] XimpleWare's assertions that the Customers somehow practiced XimpleWare's patents, whether through use, distribution, copying or modification, are just that: naked assertions, devoid of supporting facts, and are therefore insufficient to survive a motion to dismiss. *See generally Realtime Data, LLC v. Stanley,* 721 F. Supp. 2d 538, 543 (E.D. Tex. 2010) (commenting in the patent context that "[t]he Court has high expectations of a plaintiff's preparedness before it brings suit").

As an initial matter, XimpleWare's allegations are insufficiently specific to survive dismissal for the independent reason that allegations against the Customers fail to identify which Customer, if any, engaged in which prohibited action. *Automated Transaction LLC v. New York Cmty. Bank*, 12-CV-3070 JS ARL, 2013 WL 992423 (E.D.N.Y. Mar. 13, 2013) ("Defendants argue this "group pleading"—i.e., referring to both Defendants collectively as "Community" rather than distinguishing between them—is impermissible and insufficient under both Form 18 and Rule 8. The Court agrees."). Moreover, the allegations against this undefined group of

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[3] XimpleWare amended its complaint after Ameriprise filed a motion to dismiss asserting this license defense. *See* Dkt. 18. In its Amended Complaint, XimpleWare added some factual allegation to support its claim that Ameriprise breached the GPL (although those factual assertions are unlikely to be sufficient). As to the Customers, XimpleWare failed to even make an effort to allege any specific facts.

1   Defendants are also impermissibly conclusory and general.

2   ***First***, XimpleWare confusingly accuses all defendants, including the Customer

3   defendants, of "making, selling and using the DCM product." Dkt. 18 at ¶73. As discussed

4   above, any use by the Customers is licensed under the GPL. However, the allegation that the

5   Customer defendants "make[]" or "sell[]" DCM is simply implausible. XimpleWare's pleadings

6   only allege that Versata, and not any of the Customers, makes and sells the DCM product. *See*

7   Dkt. 18 at ¶60-61 (describing "Versata's DCM product," which is licensed by Versata). The

8   Customer defendants are clearly alleged to be customers of Versata. Dkt. 18 at ¶68. The claim

9   that all Defendants impermissibly infringe because all Defendants make Versata's DCM software

10   must therefore be dismissed.

11   ***Second,*** XimpleWare does not properly allege under Form 18 that any Customer makes,

12   sells or offers for sale an identified product that improperly contains XimpleWare's software. *See*

13   Dkt. 18 at ¶81 ("Defendants have infringed and continue to infringe…by making, using selling

14   and/or offering for sale …a ***number of products*** that practice the claims contained in the Patent")

15   (emphasis added). A plaintiff must "name[] and specifically identif[y] products or product

16   components" to survive a motion to dismiss, not just say that "a number of products" may

17   infringe. *Bender v. LG Electronics U.S.A., Inc.,* C 09-02114 JF (PVT), 2010 WL 889541 (N.D.

18   Cal. Mar. 11, 2010) (collecting authorities); *Wistron Corp. v. Phillip M. Adams & Associates,*

19   *LLC*, C-10-4458 EMC, 2011 WL 4079231 (N.D. Cal. Sept. 12, 2011) ("Adams has referred to

20   infringement by "other products" without providing any further identification of such products.

21   This bare reference to "products" is clearly inadequate."). The allegation of paragraph eighty-

22   one, alleging that Defendants make, use, sell and/or offer for sale "a number of products that

23   practice the claims contained in the Patent" is legally insufficient under Form 18 and the

24   allegation must be dismissed.

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Third, XimpleWare has alleged that the Customers have "distributed…DCM and VTD-XML to thousands of non-employee independent contractors or franchisee advisors or 'producers'". Dkt. 18 at ¶85. There is absolutely no basis, nor is any proffered, for this broad allegation. Again, this allegation improperly groups Customers together without specifically identifying which Customer is accused of taking which infringing action (and the Customers note that "distributing" is not an infringing action). On this basis alone, this allegation must be dismissed. However, the allegation also fails to identify what distribution, in what form, and to whom, allegedly fails to comply with the GPL license which would render all recipients licensed users. *Compare* Dkt. 18 at ¶69-72 (alleging in detail Ameriprise's improper distribution of the XimpleWare software but failing to offer any such facts with respect to the Customers). Further, the allegation itself is internally implausible because DCM is enterprise software and is not the kind of program that one installs on each machine in a company (as one would, for example, a word processing program) or distributes to affiliates and independent agents. *See* Dkt. 18 at ¶85.

D. XimpleWare Has Not Sufficiently Pled Willful or Knowing Infringement

XimpleWare has contended that Customers' purported infringement was "knowing and willful" because "Defendants actually knew" that the program was the work of XimpleWare. Dkt. 18 at ¶87.[4] "Within the Northern District, to sufficiently plead a claim for willful infringement, a patentee must make out the barest factual assertion of knowledge of an issued patent…a mere "allegation of 'actual knowledge,' without more," is not enough to state a claim for willful infringement." *Robert Bosch Healthcare Sys., Inc. v. Express MD Solutions, LLC*, C 12-00068 JW, 2012 WL 2803617 (N.D. Cal. July 10, 2012) (granting dismissal of claim for willful infringement)(internal citations omitted). XimpleWare pleads that only the Versata Defendants allegedly accessed the SourceForge project page indicating the program must be

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[4] These allegations also fail for the separate and independently sufficient ground that the allegations of willful infringement do not identify customers individually but simply identify a group.

licensed under the GPL, which itself contains no patent notices. *Id.* While XimpleWare alleges

that Versata kept an internal note regarding XimpleWare's license status, XimpleWare pleads no

facts that would support the inference that the Customers had access to Versata's internal ledger,

or that that internal ledger contained any knowledge of the patents-in-suit. XimpleWare alleges

that Versata prevented its customers from learning of XimpleWare's open source license status by

failing to include this information in its product code. *Id.* at ¶61. Such status has no relevance as

to whether or not the product at issue was patented and XimpleWare never pleads that the

Customers knew or should have known that VTD-XML was patented.   Therefore, by

XimpleWare's own allegations, knowing infringement is not only implausible, it is impossible.

In short, none of XimpleWare's allegations regarding willful infringement rise to the level of

detail required by *Iqbal* and *Twombly* and must be dismissed.

E. XimpleWare is not Entitled to Declaratory Relief Against the Customers

XimpleWare's claim against the Customers for patent infringement is barred because the

Customers are licensed, as demonstrated above. XimpleWare has also presented a claim for

declaratory relief, which is simply a rephrasing of its patent infringement claim. Based upon the

same unsound legal footing discussed above, the claim for declaratory relief must also be

dismissed. Further, as pled, the declaratory relief claim does not relate to a case or controversy

between the Customers and XimpleWare: because the Customers are licensees, none of the

declarations requested involve the Customers at all. *See* Dkt. 18 (requesting the Court declare

each of the patents valid and enforceable).   A case or controversy must exist to sustain an action

for declaratory relief. "For there to be a case or controversy under Article III, the dispute must be

"definite and concrete, touching the legal relations of parties having adverse legal interests," "real

and substantial," and "admi[t] of specific relief through a decree of a conclusive character."

Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1335-36 (Fed. Cir. 2008).   Because a

licensee's interests are not adverse where the licensor seeks to confirm its rights to act as the licensor by confirming the validity of its patents, the interests of the Customers and XimpleWare are not adverse and no case or controversy exists.

CONCLUSION

For the reasons discussed above, XimpleWare's Amended Complaint against the Customer Defendants should be dismissed in its entirety. The court has broad discretion to deny a leave to amend where Plaintiff has previously amended the compliant. *Fuzzysharp Techs. Inc. v. Nvidia Corp.*, 2013 U.S. Dist. LEXIS 126989 (N.D. Cal. 2013) citing *Ascon Properties, Inc. v. Mobile Oil Co.*, 866 F.2d 1449, 1160 (9th Cir. 1989). As Plaintiff has already amended its Complaint once in response to a Motion to Dismiss pursuant to 12(b)(6), the Customer Defendants respectfully request that the Court consider denying Plaintiff further leave to amend.

Dated: January 27, 2013   Respectfully Submitted,

                                      Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C.

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                                      ***Attorneys for Defendants Pacific Life Ins.Co.,
                                      Metropolitan Life Ins. Co., The Prudential Ins. Co. of
                                      America, Wellmark, Inc., and Aviva USA Corp.***

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that all counsel of record who are deemed to have

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consented to electronic service are being served with a copy of this document via the Court's ECF

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System.

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Dated: January 27, 2013   /s/ Alisa Lipski

                                Alisa Lipski

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